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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 212

MASS COMMUNICATORS, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION and JANE A. ROBERTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR JANE A. ROBERTS, INTERVENOR BELOW, IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. B. 1-8) is not yet reported. The decision of the Federal Communications Commission (R. 148-154) denying the Mass Communicators' petition for reconsideration is unofficially reported at 17 Pike and Fischer R.R. 572.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 16, 1959 (Pet. App. A.). The petition for a writ of certiorari was filed on July 15, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and 47 U.S.C. 402 (j).

QUESTIONS PRESENTED

The Federal Communications Commission granted JANE A. ROBERTS' application for a construction permit to replace her permit to construct a new standard broadcast station, which was inadvertently allowed to expire at a time when construction was virtually completed. This grant was made even though a new application for the identical facilities had been filed by petitioner Mass Communicators ten days prior to the aforesaid reinstatement application and even though questions concerning the qualifications of the permittee to be a broadcast licensee had been raised. The questions presented as stipulated by the parties are as follows:[1]

1. Does the Commission have the power to grant an application for a construction permit to replace an expired construction permit when the Commission cannot find that completion of the authorized construction within the time prescribed was prevented by causes not under the control of the grantee?

2. Where a construction permit granted by the Commission expired in accordance with its terms, where a new applicant subsequently files an appli-

[1] The questions presented as contained in the petition are not verbatim as presented to the court below.

cation for a construction permit for the same facilities; and where the original permittee thereafter files an application for a construction permit to replace the expired construction permit, is the Commission required to hold a comparative hearing to determine which of the two applications should be granted?

3. Where the Commission has before it unresolved questions bearing upon the qualifications of the applicant, may the Commission grant an application for a construction permit to replace an expired construction permit and postpone consideration of the said questions until the applicant later files an application for a license to cover the construction permit?

In addition, Jane A. Roberts believed the following question to be presented:

4. Was the appellant's petition for reconsideration timely and properly filed pursuant to the requirements of Section 405 of the Communications Act of 1934, as amended?

The latter question was not reached by the Court below.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*), namely Sections 308, 309 and 319, are set forth in petitioner's Appendix C.

STATEMENT

Jane A. Roberts, granted a permit by the Federal Communications Commission to construct a new standard broadcast station on 1250 kilocycles in Cedar Falls, Iowa (R. 1), built the station in accordance with her permit but inadvertently missed the completion date because of the fact that she had changed her site. Upon application for such matters, the Commission in the past has often increased the time within which the construction of the station involved could be completed (R. 9-10). Jane A. Roberts' permit involved a complicated directional array designed to give required protection to other stations in the United States (R. 1). There was no question of her being dilatory. She overran her time merely as a result of her failure to note the completion date on her modified permit and in the belief that her application to change site had automatically extended such completion date. At the stated completion date, her buildings were fully constructed, her towers erected, her ground system installed, her transmitter in place, all equipment was on hand and she was ready to request permission to test her station before its formal opening (R. 9-10).

Petitioner Mass Communicators, noting the passage of the completion date, filed an application with the Federal Communications Commission for exactly the same frequency on which Jane A. Roberts had constructed her station, in the very same town, and proposing to cover the very same area (R. 107).

Upon being advised by the Commission that her permit had expired and of the need to file an application for reinstatement, JANE A. ROBERTS immediately

made such application (R. 9, R. 7.). The latter was then granted and petitioner's application for the identical facilities returned (R. 22, R. 155-156). Petitioner thereupon filed a petition for reconsideration, again tendering its application (R. 107-124). The Commission denied such petition (R. 148-154) and again returned petitioner's application (R. 157). At the same time, it set for hearing certain questions which petitioner had raised concerning JANE A. ROBERTS' qualifications to be a broadcast licensee (R. 147). There followed an appeal by Mass Communicators to the United States Court of Appeals for the District of Columbia Circuit. The latter court affirmed the Commission's actions (Pet. App. B. 1-8).

ARGUMENT

It is well-settled that jurisdiction to review the judgments and decrees of the circuit courts of appeals by certiorari is to be exercised sparingly and only in cases of gravity and general importance, or in order to secure uniformity of decision. *In re Lau Ow Bew*, 141 U.S. 583, 35 L. Ed. 868; *Ohio v. Swift & Co.*, 260 U.S. 146, 67 L. Ed. 176. The petition for certiorari here involved presents no question of general importance warranting review. Rather, it involves narrow issues of statutory interpretation which are of no general importance.

Petitioner contends (Pet. p. 6) that Section 319 of the Communications Act of 1934, as amended, provides that a construction permit which has been allowed to expire is automatically forfeited as of its expiration date and that the sole exception to this flat rule is where completion of construction has been prevented by causes beyond the control of the per-

mittee. This contention is simply in error. As the court below held (Pet. App. B. 3-4):

> "Section 319 (b) of the Communications Act provides:
>
> '(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.'
>
> "The permit is thus required to provide for automatic forfeiture 'if the station is not ready for operation within the time specified,' subject, however, to two important avenues by which forfeiture may be avoided. If the Commission finds that the construction of the station facilities had not been completed by the specified time because of 'causes not under the control of the grantee,' the Commission cannot declare an automatic forfeiture of the permit. . . . If, on the other hand, the causes for delay of construction are within the control of the grantee, the Commission is given the power to exercise its discretion and allow further time for construction. An automatic forfeiture of the permit then occurs only 'if the station is not ready for operation . . . within such further time as the Commission may allow: . . .'"

The Court further held that [Pet. App. B. 6]:

> "It is clear then that an expiration of a permit was by no means to be considered an automatic forfeiture of the permit. Only if the Commission did not exercise its discretion in extending the time within which the facilities were to be constructed, either by an actual extension . . . or by

a grant of a new permit to replace the expired permit . . . was there to be an automatic forfeiture."

This decision follows the cases which have previously been decided by the Commission itself on this point. See *Bremer Broadcasting Corp.*, 3 Pike & Fischer R.R. 1579; *Christian County Broadcasting Co.*, 6 Pike and Fischer R.R. 849; *WAAB, Inc.*, 13 Pike and Fischer R.R. 461.

By reinstating Jane A. Roberts' construction permit, the Commission merely exercised its discretion as provided by the statute and allowed her additional time within which to complete her construction. These facts being so, petitioner's contention that the decision of the court below raises a question of fundamental importance to the administration of the Communications Act and will result in confusion is lacking in merit, especially when viewed in light of the fact that the Commission in effect merely followed its own precedent as outlined in the *Christian County* and *Bremer* cases, *supra*, which it has adhered to for years.

Petitioner's contention that it is entitled to a comparative hearing under the *Ashbacker*[2] doctrine is similarly unsound. The *Ashbacker* case decided a matter between two mutually exclusive applicants, each of whom duly filed for a specific frequency and place, new applications each, no late comers after one station had been granted a permit and virtually completed construction. Here petitioner filed a new application for an original construction permit almost a year after the grant of the JANE A. ROBERTS' permit.

[2] *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327.

at a time when JANE A. ROBERTS had all but finished building her station, having already expended money, effort and time on the project. The JANE A. ROBERTS' application for an extension of time to complete this construction and petitioner's application had no common grounds for comparison. This being so, the court below properly ruled there was no basis for applying the *Ashbacker* doctrine.

Petitioner also complains that the Commission proceeded without investigating certain matters which it had raised bearing on the applicant's qualifications. The Commission has held a hearing to determine whether or not JANE A. ROBERTS' husband had signed some of the applications and documents on her behalf and what effect this might have on JANE A. ROBERTS' qualifications. An Initial Decision has been rendered and the matter is before the full Commission for its review and final decision. The court below properly held that the Commission acted well within its discretionary powers in handling the above investigation as it has done. It is submitted that the question of basic qualifications under investigation has no relevancy to petitioner's position herein. No matter the result of such investigation, petitioner's application would still be entitled to no comparative consideration and was still properly returned.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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August 14, 1959